

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

TERRELL HENDERSON,

)

4:08CV3219

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Petitioner,

)

)

v.

)

**MEMORANDUM  
AND ORDER**

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ROBERT HOUSTON, Director State  
of Nebraska Department of  
Correctional Services,

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Respondent.

)

This matter is before the court on Respondent's Motion for Summary Judgment. (Filing No. [12](#).) The Motion will be denied. Regardless of how the limitations period is calculated, the Petition for Writ of Habeas Corpus was timely filed within the limitations period set forth in [28 U.S.C. § 2244\(d\)\(1\)](#). Additionally, based on the record as submitted by Respondent, the court is unable to determine whether any of Petitioner's claims are procedurally defaulted and/or unexhausted. Respondent may reassert its procedural default/exhaustion claims in an answer and separate brief, but must also submit the state court briefs and other relevant documents as set forth below.

IT IS THEREFORE ORDERED that:

1. Respondent's Motion for Summary Judgment (filing no. [12](#)) is denied without prejudice to reassertion.
2. Respondent shall file an answer **and separate brief** no later than 30 days from the date of this Memorandum and Order. The following procedures shall then be followed by Respondent and Petitioner:

- A. Both the answer and brief shall address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. *See, e.g.,* Rules 5(b) and 9 of the [Rules Governing Section 2254 Cases in the United States District Courts](#).
- B. The answer shall be supported by all state court records which are relevant to the cognizable claims. *See, e.g.,* Rule 5(c)-(d) of the [Rules Governing Section 2254 Cases in the United States District Courts](#). Those records shall be contained in a separate filing entitled: "Designation of State Court Records In Support of Answer."
- C. Copies of the answer, the designation, and Respondent's brief shall be served upon Petitioner except that Respondent is only required to provide Petitioner with a copy of the specific pages of the designated record which are cited in Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
- D. No later than 30 days following the filing of Respondent's brief, Petitioner shall file and serve a brief in response. Petitioner shall submit no other documents unless directed to do so by the court.

E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief.

3. No discovery shall be undertaken without leave of the court. *See* Rule 6 of the [Rules Governing Section 2254 Cases in the United States District Courts](#).

4. Petitioner's Motion for Additional State Court Records (filing no. [14](#)) is denied without prejudice to reassertion after Respondent's submission of state court records as set forth above.

March 11, 2009.

BY THE COURT:

*s/Richard G. Kopf*  
United States District Judge